Procedural Aspects of Activities of Institutional Arbitration Bodies

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I. INTRODUCTION

Institutional arbitration bodies play a very considerable role in settlement of international business disputes. Parties are free to choose between *ad hoc* arbitration and institutional arbitration. When making their choice, they obviously take into consideration existing differences between two types of arbitration. As is known, in case of institutional arbitration an arbitral body, not settling disputes itself, performs certain functions aimed at proper handing of arbitration proceedings under its rules. This kind of activity has a notable impact upon the effectiveness of arbitral proceedings. The very fact that parties often prefer to resort to institutional arbitration demonstrates the significant positive role of arbitral institutions in support of arbitral proceedings.

Activities of an institutional arbitration body to promote arbitral proceedings under its rules, including proper performance of the above-mentioned functions, contribute greatly to the success of such a body. A very good example in this regard is the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute), which is quite rightly ranked among the leading institutional arbitration centers of the world. To a large extent this is due to many years of tireless fruitful efforts by Mr. Ulf Franke, Secretary General of the SCC Institute, a prominent figure in the world of arbitration, a highly respected, learned, good-hearted person, our dear friend and colleague.

II. PURPOSE OF THE ARTICLE

The purpose of this article is to consider some activities of institutional arbitration bodies from a procedural point of view, taking as an example the International Commercial Arbitration Court (the ICAC) of the Chamber of Commerce and Industry of the Russian Federation (the RF CCI) and drawing some comparisons with the SCC Institute and the International Court of Arbitration (the Court) of the International Chamber of Commerce (the ICC). The underlying idea is to outline relevant functions performed by such institutional bodies and their organs, with special emphasis on the

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procedural aspects of such activities as compared to the procedure before arbitral tribunals.

More specific questions which arise in this context are the following. Is it possible to speak about a procedure before institutional bodies (including their organs) as a distinctive type of procedure? If so, what is different and what is common between such procedure and the procedure before arbitral tribunals? Are these two types of procedure governed by totally different provisions or not? Is there a need to develop further rules governing the procedure before institutional bodies?

The author fully understands that a detailed analysis of the above problems goes beyond the frame of an article limited in scope. His main task is to highlight the importance of these issues both from the theoretical and practical points of view in order to provoke their further elaboration in future.[1]

III. TERMINOLOGY

The following expressions are often used to describe the above-mentioned functions of institutional arbitration bodies: to administer disputes, the administration of disputes, and the like. Thus, according to the SCC Rules, the SCC Institute «is the body responsible for the administration of disputes» (Art. 1) and «providing administrative services in relation to the settlement of disputes» (Appendix I, Art. 1). The function of the SCC Institute is to «administer domestic and international disputes» in accordance with the applicable rules (Appendix I, Art. 2). The word «administration» means «the management or performance of the executive duties of a government, institution, or business».[2] Similar expressions appear in doctrinal sources.[3]

The above terms are not always used. The ICAC Rules and the ICC Rules, for example, avoid using them. According to the ICC Rules, the function of the ICC Court «is to provide for settlement by arbitration of business disputes» in accordance with the Rules (Art. 1(1)). As stated further, the Court «has the function of ensuring the application» of the Rules (Art. 1(2); Appendix 1, Art. 1(1)).

Still, the word «administration» and its derivatives are, in our view, more commonly used to describe the nature of functions performed by institutional arbitration bodies and we will use these terms from now on.[4]

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[1] The practical importance of the issues in question is quite evident. The way an institutional arbitration body performed its functions may give rise to attempts to set aside an award in courts of a country where the award has been rendered or to objections during enforcement proceedings.

[2] Bryan A. Garner (ed.), Black's Law Dictionary (8th ed. Thomson West, USA 2004) 46.

[3] E.g., see Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed. Sweet & Maxwell, London 1999) 45.

[4] Well known authors use the term «institutional supervision» when describing essential features of arbitration under the ICC Rules, also mentioning universality, geographic adaptability, openness and procedural flexibility. See W. Laurence Craig, William W. Park,

IV. ADMINISTRATION OF DISPUTES UNDER THE ICAC RULES

The ICAC Rules currently applied are effective as of March 1, 2006. These replaced the 1995 Rules. One of the objectives of changing the Rules was to delineate more carefully the functions of the ICAC and those of arbitral tribunals. For these purposes, structural changes were made and a number of provisions were added or altered.

Like the previous version, the new ICAC Rules provide that the issue of ICAC jurisdiction in a particular case is decided by an arbitral tribunal examining the case (§ 1, subpara 4). It is also added, in line with established practice, that issuing an award on the merits of a case belongs to the exclusive authority of the arbitral tribunal examining the case (§ 1, subpara 5). These provisions contribute to the understanding of the ICAC's role as an institutional body providing assistance and support with regard to dispute settlement carried out by arbitral tribunals.[5]

The Rules determine the legal status of the ICAC as an independent permanent arbitration institution with its seat in Moscow operating under the Law of the Russian Federation on International Commercial Arbitration of July 7, 1993. The Law is based upon the UNCITRAL Model Law adopted in 1985. Appendix I to the 1993 Law contains the Statute on the ICAC at the RF CCI specifying its legal status in more detail.

Separate paragraphs of the Rules, grouped under the heading «Organizational Framework», are devoted to arbitrators (§ 3), the ICAC presidium (§ 4), the president and vice-presidents (§ 5), and the secretariat (§ 6).[6] These bodies or persons are entrusted with certain powers described below.

The RF CCI approves for each five-year term a list of arbitrators which is submitted by the ICAC presidium. The general meeting of persons included in the list of arbitrators elects five members of the presidium and the ICAC president and two vice-presidents. It may be noted that persons not included in the list may serve as arbitrators as well, although they do not participate in the election of the ICAC functionaries mentioned above.

Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd ed. Oceana, New York 2000) 1-2.

[5] Similar provisions are found in the SCC Rules («The SCC Institute does not itself decide disputes», Appendix I, Art. 2) and in the ICC Rules («The Court does not itself settle disputes», Art. 1(2)).

[6] In contrast with the ICAC Rules, the SCC Rules have a special appendix regarding the organization of the SCC Institution. The ICC Rules have two appendices dealing with the statutes of the ICC Court and its internal rules. The very existence of such appendices shows that the relevant provisions (concerning the composition of the institutional body, the functions of its organs, and the procedure to be followed by them when taking decisions) both from the point of view of their scope and volume, first, are of importance; second, are of a specific nature; and, third, deserve treatment in separate documents though being part of the respective rules.

The president and vice-presidents of the ICAC are members of the ICAC presidium *ex officio*. One more member of the presidium is appointed by the president of the RF CCI. The president of the ICAC acts as the chairman of the presidium. The duties of the secretary of the presidium are performed by the executive secretary of the ICAC who has a deliberative vote at presidium meetings (§ 4, subparas 1 and 5, see also below).

The ICAC presidium exercises the following functions according to the Rules:

1. decides that the case shall be settled by a sole arbitrator (§ 17, subpara 2);

2. appoints arbitrators (§ 17, subparas 5, 6-9);

3. decides on a challenge to an arbitrator (§ 18, subpara 2);

4. decides on termination of an arbitrator's mandate (§ 19, subpara 2);

5. appoints a substitute arbitrator (§ 20, subpara 1);

6. decides on a possibility for a truncated tribunal to continue arbitration after closing of the hearing instead of replacing an arbitrator (§ 20, subpara 3);

7. decides on extension of the period for rendering an award (§ 24);

8. decides on extension of periods for correction, interpretation of an award and for issuance of an additional award (§ 43, subpara 4);

9. decides on an increase or reduction of an arbitration fee calculated in accordance with the fixed scale (schedule of arbitration fees and costs, appendix to the Rules, § 3, subpara 4, and § 4, subpara 5);

10. submits a list of arbitrators and amendments thereto for approval by the RF CCI (§ 3, subpara 3, and § 4, subpara 2);

11. proposes a candidate for the executive secretary to be appointed by the RF CCI (§ 6, subpara 2);

12. approves a list of reporters (acting as secretaries for arbitral tribunals) and updates it on a regular basis (§ 7, subpara 2);

13. approves the form of a declaration of acceptance to serve as arbitrator (§ 3, subpara 2);

14. analyzes arbitration practice, including the application of the ICAC Rules (§ 4, subpara 2);

15. considers issues relating to circulation of information about the ICAC (§ 4, subpara 2);

16. considers issues relating to international ties of the ICAC (§ 4, subpara 2);

17. considers other issues relating to the activities of the ICAC (§ 4, subpara 2).[7]

ICAC presidium decisions are taken by majority vote provided that at least three members of the presidium, including the chairman, are present. In the event of a tie, the chairman has a casting vote. Decisions of the presidium are formalized in a document called minutes. The minutes are signed by the presidium chairman and the secretary of the presidium. In case of emergency, the presidium's decisions may be taken by poll with subsequent recording of the poll result in the minutes. Members of the presidium must refrain from participating in discussion and taking presidium decisions concerning arbitration proceedings in which they are involved (§ 4, subparas 3-4, 6). When taking a decision on a challenge to an arbitrator or termination of an arbitrator's mandate for other reasons, the ICAC presidium is not required to state reasons for its decision (§ 19, subpara 3).

The above is almost an exhaustive summary of the provisions in the ICAC Rules relating to the procedure for taking decisions by the ICAC presidium. These provisions are not very detailed.

As follows from § 5 (subpara 2), the president of the ICAC performs functions within its competence according to the Rules and acts on behalf of the ICAC in Russia and abroad. In cases falling under the jurisdiction of the ICAC the president may, at the request of a party, order an interim measure of protection (Statute on the ICAC, item 6). The ICAC president is empowered to issue orders to terminate proceedings in the instances specified in the Rules where an arbitral tribunal has not been constituted (§ 45, subpara 4). If an arbitrator is unable to sign an award, the ICAC president certifies this circumstance stating the reasons for the omitted signature (§ 39, subpara 3).

The ICAC presidium may delegate some of its duties to the ICAC president (§ 4, subpara 7). In particular, the ICAC presidium may authorize the ICAC president to decide on the appointment of arbitrators (§ 17, subpara 10). The idea lying behind these provisions is to ensure prompt taking of decisions on urgent matters, while normally the presidium meets once a month.

[7] The last but not least, as the Presidium has residual powers when the allocation of functions does not follow from the Rules.

The ICAC president identifies duties of two vice-presidents. In the absence of the president his functions are performed by a vice-president designated by the president (§ 5, subpara 3).

The secretariat exercises functions necessary to ensure ICAC activities. Namely, it is responsible for keeping files of cases settled under the ICAC Rules. All correspondence of the ICAC with parties goes through the secretariat (§ 6, subpara 1, § 16).

The secretariat is headed by the executive secretary (§ 6, subpara 2) who is responsible for the work of the secretariat. The executive secretary is subordinate to the ICAC president (§ 6, subpara 4).

According to the Rules, the executive secretary performs the following functions:

- appoints a reporter for each case brought to the ICAC (§ 7, subpara 1);
- invites the claimant to rectify defects in its statement of claim if it does not meet applicable requirements (§ 11, subpara 1);
- sends a statement of claim to the respondent, with a request to submit its statement of defense within the period prescribed in the Rules (§ 12, subparas 1 and 2);
- fulfills instructions of the chairman of a tribunal relating to preparation of a case for examination, and summons parties for hearings (§ 29, subpara 2).

Before signing, a draft award is submitted by the arbitral tribunal to the secretariat which may draw attention of the tribunal to non-compliance (if any) of the draft with the formal requirements without affecting the arbitrators' liberty of decision (§ 42, subpara 1, see also § 1, subparas 4 and 5, mentioned above).

This is a new provision in the ICAC Rules aimed at ensuring compliance simply with the formal requirements for an award. These requirements are set forth in § 39, subpara 1, of the Rules. It was found useful to insert this provision in the Rules in view of the fact that more and more persons are acting as arbitrators in cases examined under the ICAC Rules, including persons who are not on the list of arbitrators and who are not always well familiar with the Rules, and the way they are applied in practice. It should be recalled in this context that an award is rendered in the name of the ICAC and certified by its seal.

If discrepancies as to the form of an award are not rectified by the tribunal, the secretariat may inform the presidium accordingly. However, under the Rules neither the secretariat nor the presidium is authorized to obligate the tribunal to rectify such discrepancies. It may be assumed, however, that the tribunal is cognizant of its task to render a correct award both in terms of its substance and form. Generally speaking, arbitrators settling a dispute are under obligation to comply with the rules applicable

and the situation in question is not an exception. It should be added that the ICAC Rules do not provide for scrutiny of an award from the point of view of its substance.

V. THE SCOPE AND NATURE OF ACTIVITIES OF ARBITRAL INSTITUTIONS

The above inventory of functions performed by the ICAC makes it possible, in our view, to better understand their scope and nature as well as to draw certain conclusions.

These functions could be broadly divided into two categories: functions bearing direct relation to particular disputes and functions having no such direct relation. Our examination of the functions exercised by the ICAC presidium starts with functions pertaining to the first category (see 1-9 above) and continues with functions belonging to the second category (see 10-17 above).

It may be pointed out that the functions belonging to the first category are not necessarily exercised with regard to each and every dispute. In this sense they are of a general nature. The second category of functions is also aimed in the long run at proper administration of disputes and it could not be said that the relevant functions have no impact on dispute settlement at all. Therefore, the distinction drawn above is not of an absolute nature.

Later, we will deal mostly with the first category of functions as they are of greater immediate practical importance with regard to particular disputes. These functions are, in our opinion, of a procedural nature. They are clearly discernible from issues pertaining to substance of disputes.

Such a characterization is a necessary step for determining the applicable law. It is widely recognized that the law applicable to matters qualified as procedural is the law of the place of arbitration unless the parties have agreed otherwise (which seldom happens). Is the same approach likewise applicable to issues linked with the relevant functions fulfilled by institutional arbitration bodies, or should the law of the legal seat of a given body be applied? This is not a purely academic question since the place of arbitration and the legal seat of an institutional arbitration body administering the dispute do not necessarily coincide. Such places may be situated in different countries.

This is strongly characteristic of ICC arbitrations.[8] According to our knowledge, there are cases where arbitrations under the SCC Rules are held outside Sweden. The situation in question is not totally excluded with regard to arbitrations under the ICAC Rules, though we are unaware of any such proceedings held outside Russia.

Surely, the simultaneous application of laws of different countries might create additional difficulties and it is generally regarded as preferable

[8] According to the Internal Rules of the ICC Court, «when the Court scrutinizes draft awards…, it considers *to the extent practicable* (emphasis added) the requirements of mandatory law at the place of arbitration». (Appendix II, Art. 6). Presumably it may leave room for application of the law of the seat of the Court (see also Art. 1(5)).

to avoid such a situation to the extent possible. The question posed is rather complex and could hardly be answered unequivocally. We do not rule out that under certain circumstances the law of the legal seat of the institutional arbitration body could be of relevance (e.g., when determining whether the composition of the arbitral tribunal was proper, whether proper notice of the appointment of an arbitrator or of the arbitral proceedings was given by the institutional body).

If parties refer to any arbitration rules in their arbitration clause these rules are incorporated in their agreement by reference. It may be recalled in this context that the ICAC Rules expressly provide that the ICAC carries out its functions in conformity with the Russian Law on International Commercial Arbitration (see above). One may argue then that, irrespective of the place of arbitration, issues connected with the administration of disputes by the ICAC are governed by the said Russian law by virtue of the parties' agreement.

However, in view of the growing similarity of arbitration laws of many countries and, normally, a very limited number of relevant mandatory provisions on procedural matters contained therein, the practical effect of application of the laws of different countries to the respective procedural issues instead of those of the place of arbitration should not be overestimated.

The ICAC Rules and the 1993 Russian Law on International Commercial Arbitration mostly deal with arbitral proceedings before arbitral tribunals. The same is true for the SCC Rules, the ICC Rules, and the Swedish Arbitration Act of 1999. This circumstance quite rightly reflects the key role of arbitral tribunals in dispute settlement. As stated above, the role of institutional arbitration bodies, though being of importance, is to provide assistance and support in relation to the settlement of disputes.

There are legal requirements which are applicable both to institutional arbitral bodies and arbitral tribunals. One might refer to Art. 18 of the 1993 Russian Law on International Commercial Arbitration, which provides for equal treatment of the parties. Another example is Art. 3 of the said Law concerning receipt of written communications.[9]

According to the ICAC Rules, the ICAC shall apply provisions of the Rules to proceedings, taking into account the parties' agreement unless it contravenes the mandatory rules of the applicable law on international commercial arbitration and the principles of the Rules. When dealing with issues that are not governed either by the Rules or the parties' agreement, the ICAC shall, subject to provisions of the applicable law on international commercial arbitration, conduct the proceedings in such manner as it considers appropriate, ensuring that the parties are treated with equality and that each party is given a reasonable opportunity to protect its interests (§ 26, subpara 2). These provisions of the Rules are addressed to arbitral

[9] See also Art. 8 and Art. 33 of the SCC Rules, Art. 3 of the ICC Rules which envisage the same requirement for communications from the institutional body and arbitral tribunals to the parties.

tribunals and to the institution as well.[10] Among other things, an attempt is made here to determine the interrelation between the Rules which legally speaking are incorporated in the arbitration agreement by reference and other terms of the agreement which deviate from the Rules.

When considering more closely the functions of institutional arbitral bodies with regard to the settlement of disputes, one may further identify two issues: decisions of such bodies and the procedure for taking them. Arbitral tribunals and institutional bodies carry out different functions. The procedure for taking decisions by an institutional body is a distinctive type of procedure as compared to the procedure before arbitral tribunals. Though some basic procedural requirements are the same (e.g., equal treatment of the parties), they are mostly governed by different provisions. There is no ground for automatically applying provisions addressed to arbitral tribunals to the decision-taking process of institutional bodies.

In line with such approach the ICAC presidium, when considering a challenge to an arbitrator, rejected the motion of a party to invite parties' representatives and tribunal members to the presidium session and to hear them in addition to written statements previously submitted which were regarded by the presidium as sufficient.[11]

The scope of assistance factually rendered by the institution when administering a particular dispute does not remain the same throughout the proceedings. The institution is relatively more active in this regard prior to constitution of an arbitral tribunal.

VI. CONCLUSION

The functions of various institutional arbitration bodies administering disputes, notwithstanding certain differences, are to a large extent similar. The number and scope of provisions governing the exercise of the said functions should be kept, in our view, to a reasonable minimum in order not to overload the rules of a given institution and not to adversely affect the flexibility of arbitral proceedings.

The issues in question deserve closer attention by legal scholars and practitioners and should be more widely discussed at conferences and seminars in international commercial arbitration. The SCC Institute and the ICAC already have a very positive experience regarding discussion of such issues in the past.

[10] Reference could be made in this regard to Art. 47 of the SCC Rules and to Art. 35 of the ICC Rules bearing the same title «General Rule» and having much similarity. According to them, in all matters not expressly provided by the rules the institution and the arbitral tribunal shall act in the spirit of the rules and shall make efforts to ensure that the award is legally enforceable.

[11] According to the Internal Rules of the ICC Court, sessions of the Court are open only to its members and to the Secretariat and only in exceptional circumstances may the Chairman of the Court invite other persons to attend (Art. 1(1) and (2)).

TABLE OF CONTENTS